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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., and SUNCREST FARMS, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, *Respondents*.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR STATE OF MINNESOTA AMICUS CURIAE

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1. Throughout its brief the Government argues that the regulations under attack are necessary to protect the market's regular or reliable suppliers against the competition

of "unregulated" milk. The primary purpose of §§ 927.83 and 927.84 of the order (7 C.F.R. 927.83, 927.84) is to prevent outside milk from displacing "sales that otherwise would have been made by pool handlers * * *." (Resp. Br. p. 25) The Government does not dispute the exclusionary effect of the challenged regulations. It defends them with the following argument (Resp. Br. pp. 29-30):

> "It is true that the compensatory payment requirement may very well work to the disadvantage of the nonpool operator in selling fluid milk within the marketing area—for any milk purchased at more than the Class III minimum price his total cost will be more than the Class I minimum price—but, as the Secretary found, there is no workable means of putting pool and nonpool operators on a plane of absolute equality. It is the pool operator and his producer who produce primarily for the marketing area, and when a choice has to be made it is not unfair to protect them as against the nonpool operator and his farmers whose interests in the marketing area are normally peripheral."

Unless privileged by some statutory exemption, marketing practices such as those in issue here are prohibited as an unlawful restraint of trade. *United States v. Maryland & Virginia Milk Producers Ass'n, Inc., et al.*, 179 F. 2d 426 (C.A.D.C.), certiorari denied 338 U.S. 831; *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States*, 193 F. 2d 907 (C.A.D.C.). Both cases involved a contract and an alleged criminal conspiracy to restrain trade in violation of § 3 of the Sherman Act. The contract is fully described by the court in its decision on the second appeal as follows (193 F. 2d at p. 911):

> "The contract between the Association and Safeway contained the following provision:

"'(3) Distributors shall pay to the Association for all milk and or cream sold and delivered to it by the Association the minimum prices, according to the use to which said milk and or cream is put, in the manner and in the amount provided for in the Marketing Agreement and Order for the Washington Marketing Area, which agreement has been approved by the United States Secretary of Agriculture and became effective February 1, 1940. A copy of said Marketing Agreement and Order is attached hereto as Exhibit "A" and by reference made a part hereof.' * * *

"* * * * *

"Under the classified use plan, milk which is utilized by the distributors for resale in fluid form is known as Class I and is paid for at the highest of three prices. Class II is milk used for cream and cottage cheese, and Class III is that which is converted into manufactured products. At the time of the trial the prices of Classes II and III were identical. This classified use system has been employed in the industry since 1916. It was one of the features of a formal marketing agreement executed in 1940 between the Association and the distributors under the Agricultural Marketing Act, a contract to which the Secretary of Agriculture was a party.

"The Association cancelled this agreement as of March 31, 1947, as it had a right to do under the Act itself. * * *" (Footnotes omitted.)

The court then noted (193 F. 2d at pp. 915-916):

"* * * this court said on the first appeal of the present case: '* * * "full supply contracts," however legal they may be in other circumstances * * * are illegal when made for the purpose of eliminating and suppressing competition. Complete monopoly is of course unnecessary; * * *' and later added, 85 U.S. App. D.C. at page 182, 179 F. 2d at page 128: 'Although the Capper-

> Volstead Act, 42 Stat. 388, 7 U.S.C.A. § 291, and the Clayton Act, 38 Stat. 730, 731, 15 U.S.C.A. § 17, give some privileges to combinations of agricultural producers, a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of an agricultural product is not privileged.'"

It is clear that here, too, absent the Secretary's approval, the challenged marketing arrangements would be "in violation of Section 3 of the Sherman Act, *United States v. Socony-Vacuum Oil Co.*, 1940, 310 U.S. 150 * * * unless relieved of this consequence by approval of such arrangements under some valid law, such as the Agricultural Marketing Agreement Act of 1937 * * *." *Maryland & Virginia* case, 193 F. 2d at p. 918, dissenting opinion.

Nowhere, however, does the Act authorize the Secretary to include in a milk order terms and conditions that have the avowed purpose and effect of foreclosing competition from a substantial market. Unable to find in the Act an express grant of authority to permit the exclusion of competing milk supplies, the Government argues that the compensatory payment provisions are authorized by § 8c(7)(D), 7 U.S.C. 608c(7)(D), as "[i]ncidental to, and not inconsistent with, the terms and conditions specified in subsections (5) - (7) of this section and necessary to effectuate the other provisions of such order." (Resp. Br. pp. 30-31)

But an intent to authorize market practices prohibited by the antitrust laws cannot be implied from the grant of an "incidental" power "to effectuate the other terms of [the] order"; for it is unlikely "that Congress intended to create 'so great a breach in historic remedies and sanctions.'"

United States v. Borden, 308 U.S. 188, 198. As this Court said in that case (308 U.S. at 199):

> "The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner. The Agricultural Act declares it to be the policy of Congress 'through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period' described. To carry out that policy a particular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. * * *"

The defendants in that case claimed, and the lower court held, that by enacting the Agricultural Marketing Agreement Act of 1937, Congress had indicated an intent to exempt milk marketing arrangements from the operation of the Sherman Act (*Borden* case *supra* at p. 197)[1]; that antitrust concepts are inapplicable in testing the lawfulness of milk marketing practices. Replying to that argument, the Solicitor said:[2]

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[1]Cf. *Maryland & Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458.

[2]See Record, *United States v. Borden*, Brief for the United States, pp. 25, 28, 29.

"The view of the court below appears to be that a series of laws enacted since the Sherman Act, although not expressly exempting agricultural products from the operation of that Act, have so undermined its basic political philosophy with respect to commerce in agricultural products that the Act no longer applies to such commerce—in short, that these later statutes have repealed the Sherman Act, so far as agricultural products are concerned, not expressly but by implication.

"This result is in conflict with well-established canons of statutory construction. The courts do not favor repeal by implication. * * * (Citing cases.)

"Furthermore, exemptions from statutes cannot be sustained merely by reference to shifts in general legislative policy but must rest upon a clear statutory expression of the intention to grant the exemption. * * * (Citing cases.) * * *

"* * * * *

"The agricultural legislation involved in this case aids rather than impedes the application of the Sherman Act to agricultural products by clarifying the conception of what are reasonable combinations and reasonable restraints in agricultural production and distribution. The Sherman Act itself does not prohibit reasonable restraints of trade. It has a double function (1) to prevent *unreasonable* restraints and (2) to define the activities of *reasonable* combinations. Broadly speaking, combinations or the exercise of power by combinations, are reasonable where they are necessary for the efficient operation of an industry or the efficient marketing of its goods. * * * (Italics theirs.)

"* * * The intention of the Agricultural Marketing Agreement Act is in part to recognize the reasonableness of certain marketing practices as an aid both to collective bargaining and the efficient distribution of agricultural products with appropriate supervision by a responsible public official. That aid goes so far as to put

> a floor under milk prices, under certain conditions, none of which were in effect when this indictment was filed or when the acts changed [sic] in the indictment were committed. The purpose of this aid is to secure parity prices to farmers, *without destroying competition or preventing the application of the Sherman Act to activities in the distribution of the product not specifically covered by marketing agreements or orders.*" (Italics ours.)

Though Congress may limit the application of the Sherman Act to industries regulated by specific statutes, such industries "are not per se exempt from the antitrust laws and repeals are not favored. [T]he antitrust laws are superseded by more specific regulatory statutes *to the extent* of the repugnancy between them." (Italics by the court.) *Pennsylvania Water & Power Co. et al. v. Federal Power Commission*, 193 F. 2d 230, 235 (C.A.D.C.), affirmed 343 U.S. 414. Though the Federal Power Act expressly immunizes certain business arrangements in the power industry from the operation of the Sherman Act, the court recognized the need for accommodating the "contrasting objectives" (193 F. 2d at p. 234) of the two acts by noting (193 F. 2d at pp. 235-236):

> "* * * That is not to say that competitive considerations may not be components of the public interest sought to be served by a particular regulatory statute, and hence a guide to a commission's exercise of its authority when the question is properly before it. * * *
>
> "* * * This limited freedom of action is an important condition precedent to proper operation of the rate-making process. Without it, the rates proposed and approved may tend to find themselves in the upper reaches of the zone of reasonableness within which rates may properly fall. The antitrust laws have been

> the means of assuring that such initiative remains unchecked by conspiracies or other illegal arrangements with which the regulatory commission is powerless to deal. * * *"

Here, too, "the problem is to accommodate two Congressional policies embodied in different statutes, the one seeking to preserve a competitive business economy and the other to obtain better returns for farmers through the medium of collective marketing. * * * The problem is to determine 'how far Congress intended activities under one of these policies to neutralize the results envisoned by the other.' And this determination is to be made with due regard for the rule that any exemptions from the antitrust laws to be implied from provisions of the [Agricultural Marketing Agreement Act] are 'special exceptions to a general legislative plan,' that is, that basic Sherman Act provisions which have governed interstate trade since 1890. * * *"[3]

Such an exemption cannot be drawn from the "incidental" power of § 8c(7)(D).

2. Section 8c(5)(A) of the Act requires that "prices shall be uniform as to all handlers." The challenged provisions of Order No. 27 compel the petitioners, who "handle" milk for distribution in the marketing area, to bear a higher cost for that milk than required of their competing distributors. (Resp. Br. p. 29). Faced with the requirement of § 8c(5)(A) that "prices shall be uniform as to all handlers," the Government attempts to avoid the clear inconsistency between the Act and the Order by limiting the applicability

[3]See Record, *Maryland & Virginia Milk Producers Association, v. United States*, 362 U.S. 458, Brief for the United States, p. 28.

of § 8c(5)(A) to "handlers" *as defined in § 927.7 of the Order*, 7 *C.F.R.* 927.7. (Resp. Br. p. 36) Milk distributors, unable to meet the "handler" definition because of operations in several markets are simply read out of the Act and the market area by characterizing them as "nonpool handlers." Except for a strained reliance on § 8c(11)(A), 7 U.S.C. § 608c(11)(A) (Resp. Br. p. 37), no authority is cited to support the "handler-nonhandler" distinction. An attempt is made to construct a rational basis for the distinction by arguing that it is contemplated by the regional regulatory plan provided for in § 8c(11)(A). (Resp. Br. p. 37)

The difficulty with the argument is that not only are these petitioners located within an area contiguous to the "regional marketing area," they are, in fact, closer to it than many of the market's "pool handlers." In addition, all of the dairy farmers who supply petitioners are located within the normal supply area for the market.[4] No claim has ever been made that either these petitioners or their dairy farmers are situated in a "peripheral" supply area. (Resp. Br. p. 30)

A more serious difficulty with the argument, however, is that the limitation placed on the term "handler" by the Secretary is not warranted by the Act. Section 8c(1), 7 U.S.C. § 608c(1) authorizes the Secretary to issue "orders applicable to processors, associations of producers, and others engaged in the handling of * * * [milk]. Such persons are referred to in [the Act] as 'handlers.'" Section 8c(5), 7 U.S.C. § 608c(5) provides that "orders issued pursuant to this section shall [among other things] provide: (A) [for the fixing of] minimum prices * * * which *all handlers*

[4] See Brief of Dairymen's League Cooperative Association, Inc., et al., *amici curiae*, map showing location of plants in Order No. 27 marketing area.

shall pay * * *. Such prices shall *be uniform as to all handlers*, * * * (B) [p]roviding (ii) for the payment to all *producers* * * * delivering milk *to all handlers* of uniform prices for all milk so delivered * * *" Subject * * * only to * * * (d) a further adjustment, equitably to apportion the total value of the milk purchased by *any handler*, or by *all handlers*, among producers * * * on the basis of their marketings of milk during a representative period of time." (Emphasis supplied.)

Nowhere in the Act is the Secretary empowered to change "all handlers" to "some handlers." Nowhere does the Act say that the Secretary may exclude some handlers from the market on the basis of his determination that they are not properly a part of the "regional marketing area." The Act's provisions for separate marketing areas (Resp. Br. p. 36) do not permit such an exclusion. The Conference Report on the bill stated:

> "Amendment No. 21: Under the House bill the uniform prices to be paid to producers for milk under the orders were to be subject to adjustments * * * to accomplish the result of equitable apportionment of the total value of milk sold *by any or all handlers*. This amendment provides for the same apportionment but it is on the basis of the milk 'purchased' *by any or all handlers*."[5] (Emphasis supplied.)

Since petitioners distribute milk in the Order No. 27 marketing area, there can be no question that they are "handlers" —whether pool or nonpool— within the meaning of the Act. If they are "handlers," then, necessarily, they must be included within the term "any handler" or "all handlers." (§ 8c(5).)

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[5]H. R. Rep. No. 1757, 74th Cong. 1st Sess. p. 20.

The Government's reliance on § 8c(11) (Resp. Br. pp. 36-39) and its claim that the regional regulatory plan "contemplated by the Act" (Resp. Br. p. 37) requires "the conclusion * * * that Section 8c(5)(A) was directed to pool handlers only" (Resp. Br. p. 37) is without any support in the Act. The "different terms, applicable to different * * * marketing areas" (§ 8c(11)(C)) that may be included in an order must, in any case, be within the limited terms and conditions authorized by §§ 8c(5)–(7). While citing §§ 8c(11)(A) and 8c(11)(C) to support its "regional marketing" argument, the Government ignores completely § 8c(11)(B) which expressly excepts milk and milk products from the "regional marketing" concept of § 8c(11). In the House and Senate reports on the bill, § 8c(11) is explained as follows:[8]

> "So that proper recognition may be given to local differences which may exist in production or marketing methods or conditions, orders are required to be limited in their application to the smallest practicable regional production or marketing areas, and orders applicable to the same commodity or product are required to prescribe such terms applicable to different production or marketing areas as will recognize local production and marketing differences. *Orders relating to milk and its products are exempted from the requirement that they be limited in their application to the smallest practicable regional production or marketing areas.*" (Emphasis supplied.)

3. The Government states on page 41 of its brief that "[t]his Court has acknowledged that the Act permits the

[8] S. Rep. No. 1011, 74th Cong. 1st Sess. p. 9; H. R. Rep. No. 1241, 74th Cong. 1st Sess. p. 9.

Secretary to differentiate among dairy farmers. *H. P. Hood & Sons v. United States*, 307 U.S. 588, 597-599. * * *" The statement, while true, is misleading; and read in context supports petitioners' position rather than the Government's. The *Hood* case, in fact, is a complete answer to the Government's attempt to eliminate petitioners' dairy farmers from the ambit of the term "producer." One of the questions in *Hood* was the meaning of the term "producers" entitled to vote in a referendum to determine producer approval of a proposed order under § 8c(9)(B)(i), 7 U.S.C. § 608c(9)(B)(i). This Court held that the term "producer" means simply a dairy farmer who, during a representative month prior to the order, delivered milk to a plant for sale in the marketing area. (307 U.S. at p. 598) The holding supported the Secretary's administrative construction of the term[7] in that case and, if followed here, would invalidate the "producer - dairy farmer" distinction upon the basis of which the present Order No. 27 regulations are constructed.

4. The Government states that petitioners' arguments of invalidity based on §§ 8c(5)(G) and 8c(5)(D) are not properly before the court because they were not raised before the agency. (Resp. Br. pp. 52, 54)

The question for decision in this case is whether certain provisions of Order No. 27 are authorized by the Act. If they are prohibited by or inconsistent with §§ 8c(5)(G) and

[7]"The Secretary considered as producers those persons who, during a representative period (May, 1937), delivered milk to a station, which station in that month shipped some part of its products to the marketing area as milk or cream and was approved by one or more of the health authorities in the marketing area." See Record, Vol. II, *Hood & Sons v. United States*, 307 U.S. 588; *Whiting Milk Company v. United States*, No. 809, Brief for Respondent p. 115.

8c(5)(D), it follows that they cannot stand on the "incidental" powers of § 8c(7)(D) as claimed by the Government. (Resp. Br. pp. 30-31)

The rule that precludes judicial review of issues not raised before the administrative agency is inapplicable where the action taken by the agency is challenged as wholly beyond its statutory authority. *Leedom v. Kyne*, 358 U.S. 184; *F.T.C. v. Henry Broch*, No. 74, Oct. Term 1961. The distinction between such a challenge and an attack on the agency's findings or rulings was thoroughly considered by this Court in *Broch* and was relied upon by the Solicitor in his argument to the Court.

5. It is no answer to the § 8c(5)(A) requirement of uniform class prices to say that the Act requires only that *minimum prices* shall be uniform and that there is no statutory prohibition against paying more than the minimum price. (Resp. Br. p. 45) The issue here concerns the minimum price that handlers are *required* to pay by the Act and its regulations; not the cost that the handler chooses to incur by voluntary payments in excess of the minimum prices. Petitioners' complaint is that the challenged provisions compel them to pay a price higher than that charged pool handlers for milk used for the same purpose. It is the compulsion of the challenged regulations that violates the uniformity requirements of § 8c(5)(A) regardless of what arrangements are worked out between petitioners and their farmers.

6. To say that the compensatory payments made to the Producer Settlement Fund are not part of the "price" is to fail to perceive the purpose and operation of the equalization fund. (Resp. Br. p. 48) The fund is simply a clearing house and conduit through which handlers who have a utilization higher than the market average pay the excess to

those handlers having a lower utilization, to permit the latter in turn to pay producers the uniform price established in the market. The money paid in or taken out of the fund is paid, in turn, to the producers and represents a portion of the price that they receive for their milk. If the compensatory payment paid into this fund for distribution to producers is not part of the price, then what is it? How else is it reflected on the accounts of the handler who pays it if not as part of the cost of his milk?

7. The challenged provisions are described by the Government as a plan for "partial regulation." (Resp. Br. pp. 55-57) It argues that since petitioners' fluid milk sales in other markets may be subjected to full regulation under Order No. 27, they should not complain of the "benefits of partial regulation in lieu of full regulation. * * *" (Resp. Br. pp. 55, 56)

Petitioners' complaint is not against "partial regulation" but, rather, against discriminatory regulation. With respect to milk sold in the marketing area covered by Order No. 27, petitioners are required to pay a tariff which disables them from competing with other Order No. 27 handlers. They may avoid the payment by electing to subject *all* their fluid sales — in regulated and non-regulated markets — to the Order No. 27 market administrator's regulatory power. (Resp. Br. p. 56) Since the latter alternative would subject to regulation some milk sold in unregulated areas in competition with unregulated handlers, petitioners choice is between loss of their share of the Order 27 market or loss of their other markets—a choice intended to force petitioners out of the Order No. 27 marketing area.

The Act regulates handlers with respect to milk sold in a regulated area. The Secretary is permitted to issue an order

fixing prices whenever he finds "that the parity prices of [milk] are not reasonable in view of * * * the economic conditions which affect market supply and demand for milk * * * *in the marketing area to which the contemplated* * * * *order* * * * *relates.*" (§ 8c(18), U.S.C. § 608c(18).) (Emphasis supplied.) The first issue in every promulgation proceeding called to consider the adoption of an order in a marketing area is the question of "need for an order." In every decision and recommendation following such a hearing, there is included under the Secretary's Findings and Conclusions his determination with respect to the conditions in the marketing area which call for the exercise of his regulatory power. (See e.g., R. 698a.) Section 8c(4), 7 U.S.C. § 608c(4) directs the Secretary, after notice and opportunity for hearing, to:

> "* * * issue an order *if he finds, and sets forth in such order, upon the evidence introduced at such hearing* (inaddition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of [the Act] with respect to such commodity." (Emphasis supplied.)

Many areas of the United States are not regulated by a marketing order because no finding of need for regulation has ever been made in these areas. Nonetheless, the Government argues that the Administrator of Order No. 27 has the power to determine the price that handlers shall pay for milk sold in any area of the United States. A power based upon the need for regulation in the Order No. 27 marketing area is thus extended to other marketing areas notwithstanding the total absence of any evidence that would justify the exercise of regulatory power in such areas.

The Secretary's regulatory power is limited only to handlers with respect to milk sold in a regulated marketing area. See *United States v. Rock Royal Cooperative, Inc., et al.*, 307 U.S. 533, 565. The power to subject to regulation milk sold by petitioners outside of the marketing area, claimed by the Secretary, is wholly without warrant in the Act and is contrary to its purpose.

CONCLUSION

Minnesota's interest in these proceedings arises from its position as the second largest milk producer in the United States. Access to markets is necessary if the vigor of its dairy industry is to be maintained. The challenged regulations of Order No. 27 reflect a protected market concept of the dairy industry that is inappropriate to the 1960's and which keeps Minnesota's dairy business in a state of "arrested development." Cf. *Georgia v. Pennsylvania RR Co.*, 324 U.S. 439, 444, 450. For the foregoing reasons the State of Minnesota urges that the decision of the court below be reversed.

Respectfully submitted,

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